

HILLSBOROUGH, SS
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc., Thomas M. Burke,
Marie I. Burke and Bernardine P. Donelson

AMENDMENT TO PLAINTIFF'S EXHIBIT LIST

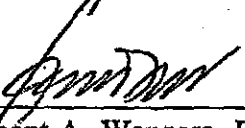
The plaintiff intends produce the following additional exhibits at the Trial in this matter which shall occur on Wednesday, June 15, 2005:

1. All Durable Powers of Attorney signed by Marie I. Burke.
2. All Health Care Powers of Attorney signed by Marie I. Burke.
3. All transmittal letters conveying conformed copies of Powers of Attorney, wills, trust or trust amendments.
4. Marie I. Burke's current will and all prior wills.
5. Marie I. Burke's Revocable Trust.
6. All amendments to Marie I. Burke's Revocable Trust.
7. All checking account statements, registers and cancelled checks of Marie I. Burke.
8. All summaries of checking accounts, income and expenses, prepared on Marie I. Burke's behalf for accountants.
9. Copies of all statements from stock brokers, investment advisors or others regarding Marie I. Burke's stocks, bonds or any and all other investments.
10. Copies of all bank accounts, certificates of deposit, stocks and bonds and any and all other investments of Marie I. Burke.
11. Copies of all of Marie I. Burke's income tax returns.
12. Copies of all of Marie I. Burke's financial records.

The plaintiff reserves the right to update this list of exhibits up to and including the time of trial.

Respectfully submitted,
Edward J. Burke
By his attorney,


Date: June 8, 2005

By: 

Vincent A. Weners, Jr., Esquire
84 Bay Street
Manchester, NH 03104
(603) 669-3970

CERTIFICATION

I hereby certify that on 8th day of June, 2005, a copy of the within Amendment to Plaintiff's Exhibit List was mailed to James A. Normand, Esquire, Ovide M. Lamontagne, Esquire, Danielle L. Pacik, Esquire and Ruth Tolf Ansell, Esquire, opposing counsel.



Vincent A. Weners, Jr., Esquire

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HILLSBOROUGH, SS
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc., Thomas M. Burke,
Marie I. Burke and Bernardine P. Donelson

SECOND AMENDMENT TO PLAINTIFF'S EXHIBIT LIST


The plaintiff intends produce the following additional exhibits at the Trial in this matter which shall occur on Wednesday, June 15, 2005:

1. Copies or originals of all Wills executed by Marie I. Burke prior to January 7, 1999.
2. A list of Marie I. Burke's assets prepared by Thomas M. Burke and given to Ruth Tolf Ansell, Esquire.
3. A list of Marie I. Burke's grandchildren by name and birth date prepared by Thomas Burke and given to Ruth Tolf Ansell, Esquire.
4. All documents relating to the purchase and/or sale of real estate situate at: Rockland Avenue, Manchester, NH; North Adams and Webster Streets, Manchester, NH; and Webster Street, Manchester, NH.

The plaintiff reserves the right to update this list of exhibits up to and including the time of trial.

Respectfully submitted,
Edward J. Burke
By his attorney,

Date: June 13, 2005

By 
Vincent A. Weners, Jr., Esquire
84 Bay Street
Manchester, NH 03104
(603) 669-3970

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.
Thomas M. Burke
Marie I. Burke
Bernardine P. Donelson

EX PARTE MOTION TO QUASH SUBPOENA
SEEKING PRODUCTION OF DOCUMENTS

NOW COME Respondent, Marie I. Burke, by and through her attorneys, Ansell & Anderson, P.A., and Attorney Ruth Tolf Ansell, and respectfully move to submit the following:

1. On June 13, 2005, the Petitioner served upon Respondent, Marie I. Burke, a *subpoena duces tecum*, attached as Exhibit A, seeking to compel the production of documents at 9:00 a.m. on June 15, 2005; one hour prior to the commencement of the trial in this matter.
2. Also on June 13, 2005, the Petitioner served upon Attorney Ruth Tolf Ansell a *subpoena duces tecum*, attached as Exhibit B, seeking to compel the production of documents at 9:00 a.m. on June 15, 2005, one hour prior to the commencement of the trial in this matter.
3. Each of the *subpoena duces tecum* include a demand for the production of documents not included on the Plaintiff's Exhibit List (filed on May 24, 2005) or

Amended Exhibit List (filed on June 8, 2005).

4. The Plaintiff never requested the production of many of the documents included in the *subpoena duces tecum* prior to June 13, 2005.
5. At the pre-trial conference on January 20, 2005, it was agreed that discovery in this matter would be concluded by May 2, 2005. See Rule 62 Conference Report.
6. Transmittal letters conveying conformed copies of estate planning documents and all other communication between an attorney and her clients is protected from disclosure under the attorney-client privilege. Many of the requested documents fall within the attorney client privilege. Rule 502, Evidence.
7. Many of the requested documents are not relevant to the pending issues and the requests are overly broad, not being limited in time or scope. By example, Maire I. Burke cannot produce copies of all income tax returns that she ever signed, all checking account statements, registers and checks, or all investment statements.
8. An undue burden would be imposed on Marie I. Burke and Ruth Tolf Ansell to produce all of the requested information in less than two days before trial.

WHEREFORE, Respondent Marie I. Burke and Attorney Ruth Tolf Ansell respectfully request that this Court:

- A. Quash the subpoena issued to Marie I. Burke;
- B. Quash the subpoena issued to Attorney Ruth Tolf Ansell; and
- B. Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

MARIE I. BURKE

By and through her attorneys,

ANSELL & ANDERSON, P.A.

Date: June 14, 2005



Ruth Tolf Ansell, Esquire
40 South River Road, Unit #32
Bedford, NH 03110
(603) 644-8211

Date: June 14, 2005



Ruth Tolf Ansell, Esquire
40 South River Road, Unit #32
Bedford, NH 03110
(603) 644-8211

CERTIFICATION OF SERVICE

I certify that on this date I hand delivered copies of the foregoing to: Vincent A. Widders, Jr., Esquire, 84 Bay Street, Manchester, NH 03104; James A. Normand, Esquire, 15 High Street., Manchester, NH 03104; Ovide M. Lamontagne, Esquire, 111 Amherst Street, Manchester, NH 03101; and Danielle Pacik, Esquire, 111 Amherst Street, Manchester, NH 03101.

Date: June 14, 2004



Ruth Tolf Ansell, Esquire

SUBPOENA DUCES TECUM

STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS

TO: Ms. Marie Burke
121 Arah Street
Manchester, NH 03104

You are required to appear before the Hillsborough County Superior Court, 300 Chestnut Street, Manchester, New Hampshire, on Wednesday, June 15, 2005 beginning at 9:00 a.m. for a Court Trial to be held by and betwixt

Edward J. Burke v. Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke and Bernardine P. Donelson

and you are required to bring with you and produce at the time of the Court Trial aforesaid, the documents in the attached list.

HEREOF FAIL NOT, as you will answer your default under the penalties prescribed by law.

Dated at Manchester, N.H. June 13, 2005



Vincent A. Weners, Jr., Justice of the Peace

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Edward J. Burke v. Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke and Bernardine P. Donelson

Hillsborough County Superior Court
Northern District
Docket No.: 04-E-0251

**DOCUMENTS TO BE PRODUCED FOR SUBPOENA DUCES TECUM
FOR COURT TRIAL ON JUNE 15, 2005 AT 9:00 A.M.**

1. All exhibits listed by any other party to this action.
2. Any and all e-mail correspondence, hand-written notes or other documents which relate to this claim.
3. Any and all e-mail correspondence, hand-written notes or other documents including, but not limited to, accounting records, loan documents and tax returns which relate to Bunny's Superette, Inc. and this claim.
4. Any trust documents or wills executed by Marie I. Burke.
5. Any deeds to or from the parties.
6. Any and all correspondence exchanged by the parties.
7. Any and all pleadings, interrogatory answers, depositions, photographs or other documents in the possession of any party to this case or referred to by any party in this case.
8. All Durable Powers of Attorney signed by Marie I. Burke.
9. Health Care Powers of Attorney signed by Marie I. Burke.
10. All transmittal letters conveying conformed copies of Powers of Attorney, wills, trust or trust amendments of Marie I. Burke or the Marie I. Burke Trust.
11. All checking account statements, registers and cancelled checks of Marie I. Burke.
12. All summaries of checking accounts, income and expenses, prepared on Marie I. Burke's behalf for her accountants.
13. Copies of all statements from stock brokers, investment advisors or others regarding Marie I. Burke's stocks, bonds or any and all other investments.

14. Copies of all bank accounts, certificates of deposit, stocks and bonds and any and all other investments of Marie I. Burke.
15. Copies of all of Marie I. Burke's income tax returns.
16. Copies of all of Marie I. Burke's financial records.
17. Copies or originals of all Wills executed by Marie I. Burke prior to January 7, 1999.
18. A list of Marie I. Burke's assets prepared by Thomas M. Burke and given to Ruth Tolf Ansell, Esquire.
19. A list of Marie I. Burke's grandchildren by name and birth date prepared by Thomas Burke and given to Ruth Tolf Ansell, Esquire.
20. All documents relating to the purchase and/or sale of real estate situate at: Rockland Avenue, Manchester, NH; North Adams and Webster Streets, Manchester, NH; and Webster Street, Manchester, NH.

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SUBPOENA DUCES TECUM

STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS

TO: Ruth Tolf Ansell, Esquire
Ansell, Barradale Law Firm
40 South River Road
Bedford Place - Unit 32
Bedford, NH 03110

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Edward J. Burke v. Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke and
Bernardine P. Donelson

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HEREOF FAIL NOT, as you will answer your default under the penalties prescribed by law.

Dated at Manchester, N.H. June 13, 2005



Vincent A. Weners, Jr., Justice of the Peace

Edward J. Burke v. Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke and Bernardine P. Donelson

Hillsborough County Superior Court
Northern District
Docket No.: 04-E-0251

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FOR COURT TRIAL ON JUNE 15, 2005 AT 9:00 A.M.**

1. All exhibits listed by any other party to this action.
2. Any and all e-mail correspondence, hand-written notes or other documents which relate to this claim.
3. Any and all e-mail correspondence, hand-written notes or other documents including, but not limited to, accounting records, loan documents and tax returns which relate to Bunny's Superette, Inc. and this claim.
4. Any trust documents or wills executed by Marie I. Burke.
5. Any deeds to or from the parties.
6. Any and all correspondence exchanged by the parties.
7. Any and all pleadings, interrogatory answers, depositions, photographs or other documents in the possession of any party to this case or referred to by any party in this case.
8. All Durable Powers of Attorney signed by Marie I. Burke.
9. Health Care Powers of Attorney signed by Marie I. Burke.
10. All transmittal letters conveying conformed copies of Powers of Attorney, wills, trust or trust amendments of Marie I. Burke or the Marie I. Burke Trust.
11. All checking account statements, registers and cancelled checks of Marie I. Burke.
12. All summaries of checking accounts, income and expenses, prepared on Marie I. Burke's behalf for her accountants.
13. Copies of all statements from stock brokers, investment advisors or others regarding Marie I. Burke's stocks, bonds or any and all other investments.

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COPY

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie L. Burke,
and Bernardine P. Donelson

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

The Plaintiff respectfully requests that the Court make the following findings of fact and rulings of law:

1. There existed between Bernard Burke, his wife, Marie Burke, and their children, Edward J. Burke, Thomas M. Burke, and Bernardine P. Donelson, a verbal agreement that all of the property owned by Mr. and Mrs. Burke, consisting primarily of the business known as Bunny's Superette, and the real estate and personal property which was derived primarily from the profits and operation of that business, (i.e. situate on Pine Street, 68 and 100 Webster Street, Liberty Street and Arah Street) belonged to the members of the Burke family in equal shares. Specifically, Mr. Burke and his children agreed that the business of Bunny's Superette, the land and building on which it was situate, and various other real estate, in addition to Mr. Burke's estate, was "all of ours in equal shares". The consideration for the agreement was, on the part of the children, that each of them work hard in the family business without compensation. The children did so and Mr. and Mrs. Burke, although keeping the legal title to the property in their name or names until 1999, acted in compliance with the agreement.

2. The agreement between the parties continued and was observed after Mr. Burke's

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death in 1991. Specifically, Marie Burke, Edward J. Burke, Thomas M. Burke and Bernardine P. Donelson agreed that all such property continued to be owned equally by the parties. 3.

3. Specifically, after Bernard Burke died, the business known as Bunny's Superette was owned in four equal shares (and incorporated and formalized by the issuance of shares) and, it was agreed that Mrs. Burke would continue to hold legal title to the real estate in her name, although Thomas and Edward Burke would manage the property for her and generate net rental for her income. The business, the real estate, and the balance of her estate, continued to be owned equally by the four (4) members of the Burke Family during their lifetimes and, at Marie Burke's death, would pass in one-third equal shares to Thomas, Edward and Bernardine.

4. Oral agreements between parents and children to hold property in such a manner or to leave an estate to children in such a manner is not unusual in New Hampshire jurisprudence. See, Tsiatsios v. Tsiatsios, 140 N.H. 173 (1995) and Shaka v. Shaka, 120 N.H. 780 (1980). Compliance with the Statute of Frauds or Statute of Wills is not required in order to enforce such an agreement. See, Foley v. Elliot Hospital, 98 N.H. 186 (1953); Boyle v. Dudley, 87 N.H. 282 (1935). The grounds for enforcing a contract include full performance, part performance, detrimental reliance, quantum meruit, fraud, undue influence, and other equitable considerations.

5. In Tsiatsios, supra, the decedent orally promised to bequeath a farm and motel to his children in exchange for their promise to provide services to him without monetary compensation. The children performed their part of the bargain for a good part of their lives, working hard from a young age and foregoing many youthful activities. The decedent often repeated his promise regarding his bequest of the real estate to the children in exchange for their services. After his wife died, the decedent hired a housekeeper and executed a will leaving the property to his female housekeeper. The jury found that the decedent had made an oral promise

to bequeath his estate to his children in return for their contribution to the family finances. The Trial Court held that although ordinarily oral contracts to devise real property as compensation for personal services are unenforceable under the Statute of Frauds (see RSA 506:1), it does not fall within the Statute "when some operating facts, such as fraud, part performance or other equitable considerations, are present." See, Ham v. Goodrich, 37 N.H. 185 (1858), and Weale v. Massachusetts Gen. Housing Corp., 117 N.H. 428 (1977). The Court held that the performance of the services was substantial and it was not necessary that the children provide the services up until the day of their father's death. The oldest child began working for his father when he was very young and he was never idle. The agreement was "the philosophy under which the family ran" and the decedent repeated his promise "all the time." This evidence, which is remarkably similar to that in the case at bar, was held by the Supreme Court to sanction the existence of a valid offer, acceptance, and consideration.

6. In Tsiatsios, some of the real estate, as in the case at bar, had been conveyed by the decedent to the housekeeper. The Supreme Court held that under the Uniform Fraudulent Transfer Act, RSA Chapter 545-A, the Trial Court was able to set aside the transfer unless the transferee took in good faith and for reasonably equivalent value. See, RSA 545-A:8. In Tsiatsios, and in the case at bar, the defendant, Thomas Burke, who was the transferee of the land and building on which Bunny's Superette, Inc. sat, did not give reasonably equivalent value in exchange for the transfer and, as a result, it is proper for a judgment to be entered for the Plaintiff. The Supreme Court held that there was no necessity for the Plaintiff to obtain a judgment against Marie Burke, the transferor, or Thomas Burke, the transferee, before the Court is able to set aside the transfer if in doing so, it will effectuate the agreement between the parties and if by declining to do so, it is unable to enforce the agreement. The decedent in the Tsiatsios

case, in fact made it clear to the housekeeper that she should sell the real estate before the children could "pull it into court". This testimony is remarkably similar to that offered by Thomas Burke that his mother was prompted to convey the real estate so that Edward Burke, could not pull the will and trust into Probate Court.

7. It is not necessary to assert a claim solely against the transferee of fraudulently conveyed property in order to secure the re-conveyance of the same. See, Town of Nottingham v. Bonsur, 146 N.H. 418 (2001). It is not solely agreements to bequeath property, or to leave estates at death, that are either enforced or not enforced by the Supreme Court of the State of New Hampshire based upon oral agreements, or set aside on the basis of fraud, duress or undue influence. In Andersen v. Andersen, 125 N.H. 686 (1984), the Supreme Court held that a property settlement in a divorce, like any other contract in the State of New Hampshire, may be set aside for "fraud, undue influence, deceit and misrepresentation." See, Durkin v. Durkin, 119 N.H. 41 (1979). The New Hampshire Supreme Court held that the basic rule was that the plaintiff need prove (1) a relationship of trust, (2) a breach of that trust, and (3) a resulting action which failed to fulfill the plaintiff's intentions.

8. In Edgerly v. Edgerly, 73 N.H. 407 (1905), the decedent had expressed an intention of dying intestate. As in the case at bar, both Mr. and Mrs. Burke had agreed that the property belonged to themselves and all of their children equally. Marie Burke executed no will until Thomas Burke took her to his lawyer to write the will. As in Edgerly, at the date of the will, Marie Burke was old and in feeble health, she was not likely to form new ideas, she could be easily influenced to accede to the wishes of Thomas Burke, and she was brought to the office of Thomas Burke's lawyers, Devine, Millimet & Branch, where she was introduced to Attorney Ruth Ansell. The burden is on the Plaintiff, Edward Burke, to demonstrate whether or not it is

more probable than otherwise, that Mrs. Burke's will, Trust and subsequent amendments to her Trust, were prepared by undue influence. The New Hampshire Supreme Court held that the usual presumption and validity of the will does not arise when it is executed under circumstances that the Testatrix was dependent upon or subject to the control of another, makes a will in that other's favor, and there is an absence showing that the transaction was fair and honest.

9. The Defendant, Thomas Burke, unduly influenced the Defendant, Marie Burke, and to execute her will and Trust in 1999, and to convey real estate to Thomas Burke in 2004, and these transfers should be set aside.

10. In Edgerly, supra, the Supreme Court held that whenever it appears that the Donor was dependent upon or under the control of the Donee, and that the Donee took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence. In Edgerly, it could be further found that the Donee was the confidential advisor of the Testatrix with respect to all of her business affairs, and that she was dependent upon him and subject to his control in such matters and that her condition was such that she was hardly capable of forming new ideas but could be easily influenced to do as he wished and that the Donee was anxious to have her make a will in his favor and took her to a scrivener of his choosing who executed a will giving him substantially all of the property.

11. Marie Burke was dependent on Thomas Burke and subject to his control and was easily influenced to make a will, Trust, and deed in his favor.

12. Knox v. Perkins, 86 N.H. 66 (1932) considered verbal agreements made by and between the parent and two foster children. As in the case at bar, the agreement was not limited to specific property, but to the total assets of the estate on the theory that there was a valid and enforceable contract between the mother and the step-son to refrain from altering their wills.

Performance by the mother of her part of the agreement would take the case out of the Statute of Frauds. See, Southern v. Kittredge, 84 N.H. 307. Likewise, the Statute of Wills would not be violated for such a contract is not a testamentary disposition of property. See, White v. Winchester, 124 Md. 518.

13. The Plaintiff has substantially performed the agreement by working for years and Marie Burke breached the agreement by transferring nearly all of her property to the Defendants before her death.

14. In the case at bar, the agreement between Mr. Bernard Burke and Marie Burke, and their children, was that all three of the children would be treated equally with respect to their parents' estate. This agreement was to be implemented, until 1999, by treating the property as equally owned during Marie Burke's lifetime and at her death by Mrs. Burke dying intestate or otherwise dividing her estate equally among her children. It was only in 1999 that Marie Burke actually or anticipatorily breached the agreement, because of the undue influence of Thomas Burke, and executed a will, Trust and deed, in violation of the agreement.

15. This court has the authority to enforce an agreement by setting aside transfers by deed, or Trust, or modifying such instruments and otherwise exercising all remedies which it has in equity, upon a showing that the parties executed deeds of conveyance, trusts, or other agreements due to fraud, duress, undue influence, deceit or misrepresentation. See Durkin, supra at 119. The court may grant reformation in proper cases where the instrument (in this case, the deed from Marie Burke to the Trust and then the Trust to Thomas Burke, as well as the pour-over trust and the various amendments to the Trust) fails to express the intentions that the parties had in making the original agreement to treat all members of the family equally. See, Erin Food Servs., Inc. v. 688 Props., 119 N.H. 232 (1979); Gagnon v. Pronovost, 97 N.H. 58 (1951).

16. In Curtice v. Dixon, 74 N.H. 386 (1907), the New Hampshire Supreme Court considered the elements of undue influence in determining whether or not to set aside or compel the restitution of property transferred by one party to his niece upon the grounds of undue influence. The evidence was that the transferor was eighty-eight years old when the contract was made and that there were other nephews and nieces who had been treated equally in his will, prior to the transfer in question. The Supreme Court held that the Trial Court properly inquired as to whether or not the transaction was unjust and unreasonable, and that that finding would be evidence as to not only mental competence but as to undue influence. The decedent had the right to dispose of his property as he saw fit, but if the disposition was unreasonable or unjust or naturally to be expected, it may be considered as evidence of undue influence.

17. The disposition of this matter is unreasonable and unjust in view of the agreement made by the parties and the adherence to the same for many years prior to 1999.


18. The Defendant, Thomas Burke, acted for a number of years as a de facto attorney for Marie Burke. Accordingly, if the Court were to find that the transfer of real estate to Thomas Burke, the execution of the will and Trust by Marie Burke, were substantial products of the control which Thomas Burke held over Marie Burke and her decisions regarding property, Thomas Burke should be held to the same standard as required for an agent as set forth by RSA Chapter 506. Specifically, RSA 506, IV (b) provides that if the agent made a transfer for less than adequate consideration, the agent shall be required to prove by a preponderance of the evidence that the transfer was authorized and was not a result of undue influence, fraud or misrepresentation. Thomas Burke has not met this burden of proof.

19. The attached Chronology demonstrates that the Defendants purposely kept the Plaintiff in the dark and made changes to divest control of all assets to Thomas Burke and divide

substantially all assets between Thomas Burke and Marie Burke.

Respectfully submitted,
Edward J. Burke
By his Attorney,

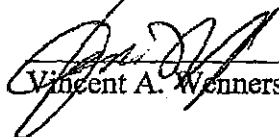
Dated: June 15, 2005



Vincent A. Weners, Jr., Esquire
84 Bay Street
Manchester, NH 03104
(603) 669-3970

CERTIFICATION

I hereby certify that a copy of the within Requests for Findings of Fact and Rulings of Law has been hand-delivered to James A. Normand, Esquire, Ovide M. Lamontagne, Esquire, and Danielle L. Pacik, Esquire, Ruth Tolf Ansell, Esquire, opposing counsel.



Vincent A. Weners, Jr., Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie I. Burke,
and Bernardine P. Donelson

PLAINTIFF'S MEMORANDUM OF LAW

I. FACTS:

1. THE AGREEMENT:

The agreement between Bernard and Marie Burke, and Edward, Thomas and Bernardine, their children, was that everyone was to work hard and as soon as they were able, for the common benefit of their family. In return, each member of the family owned an equal share in the family business and the family's property, and, upon the death of the parents, the children would continue to own equal shares. Money and family were about equal in importance was the philosophy upon which the Burke children have been raised, according the testimony of Marie Burke.

Thomas Burke testified no such agreement existed. Marie Burke testified that "she did not think" there was such an agreement. Bernardine testified that she did not recall, one way or the other, her father, Bernard Burke, telling family members that the agreement was that all were working for one another and that all members of the family owned the business, real or personal property that resulted from the profit or revenue of the business, equally. She testified that Bernard could have made these statements or he could not have made these statements. She just did not recall. She testified that Thomas and Edward spent more time with the business and such conversations were more likely to have occurred between them and her father than to have included her. She did testify that after Bernard Burke died in 1991, there were discussions among Thomas, Edward, Marie and herself regarding the business and it was decided (as she recalled, at her own suggestion) that the business be incorporated and shares issued to all four of them equally. Bernardine did not work in the store in 1991, was married, had her own family, and was engaged full time in the real estate business. She was clearly of the opinion, in 1991, when she made her

suggestion that she did, in fact, own a one-quarter interest, at least in the business. When asked whether or not the agreement included the real estate, she indicated that she "was not in" on that discussion. Bernardine did not know one way or another whether or not the real estate was included in what was to be owned equally by the family and, apart from the equal twenty-five interest that each member of the family each owned in the business, the balance of the agreement was arranged among Edward, Thomas and Marie.

After Bernard Burke died in 1971, Marie, Thomas, Edward and Bernardine re-affirmed the agreement, i.e., that the family property was owned equally by all of them and, at Marie's death, was to be owned equally by Thomas, Edward and Bernardine. The only modification to the agreement was that although the real estate would continue to remain in Marie's name, she would receive the rental income from the same, and that the businesses would, for insurance and liability purposes, be incorporated, with all four owning an equal number of shares of stock. In addition, it was understood by all of the parties that in the mid-1980s (approximately 1985 or 1986), when Marie Burke became 65, she would collect her Social Security checks and cash the same. She testified that she did so and that those Social Security checks provided her with her cash needs from that time until the present, without a need to either deposit the same into the joint account with Thomas, or to withdraw any substantial amounts of cash from that joint account.

Thomas and Edward Burke relied on this agreement their entire lives. They worked at the family business from the time they were young children until the present. Edward began working in the restaurant when he was ten or twelve years old and is now sixty. He spent fifty years of his life working in reliance upon this agreement. Thomas Burke also worked in reliance upon this agreement, albeit with some further "time off" to attend college and spend some time in the Service, and he performed somewhat lighter duties as a child. Bernardine Donelson also relied upon this agreement, working through her childhood and young adult years until she married, began teaching, and then later became a realtor. She has continued until the present time to occasionally help out in the family business, whether as a cashier or a realtor, and was not needed to work every day, as were Thomas and Edward. She was nevertheless considered to be an equal, participating member of the family insofar as ownership was concerned.

Edward Burke relied on this agreement to his detriment. Accordingly, there was adequate consideration for the agreement. He worked every single day of his life for the family business from approximately the age of ten until February, 1996. He gave up lunch hours during school as well as after-school activities in order to work - first

in the restaurant and then in the store and related family business purposes. The whole family worked hard and took but a few trips before Edward's high school years to York Beach, Maine; otherwise, there were no vacations and Edward's after-school activities were limited to occasional CYO baseball games. Edward received no salary for his work until after he was married, some years after graduating from high school. Even then, his salary was barely what he needed to survive. Although the business was owned equally by all of the family members, there was no doubt that Bernard Burke was the boss and he determined when and how much Edward Burke's salary was to be.

Edward Burke testified that but for the agreement and his reliance on the same, he would have looked elsewhere for much higher salary or compensation and not have spent the years that he did working for the family. The Defendants apparently argue that Edward Burke was adequately compensated for his years of work in the family business first, by having his room and meals paid for as well as clothing and other costs of being brought up, together with an allowance and use of the family car when he was young, prior to his marriage, and second by being paid a salary once he was married. However, the compensation paid to Edward Burke after his marriage was marginal compared with what he could have earned elsewhere given the number of hours and loyalty he extended to the family business, together with his talents and ability to operate several supermarkets at one time.

Edward would not have worked so hard, for so long, and for so little money, but for the agreement and his belief that he owned an equal share in the family business and in the real and personal property that the business generated. No child works from the age of ten until marriage in his early twenties for no compensation at all unless there is some financial understanding by and between the father and the son. Edward Burke would have not devoted that amount of time of his early childhood and adult years for no pay, simply out of love for his family. He did so because he relied on the agreement that he owned an equal share in the family business and the real and personal property derived from the profits of the business.

All parties agree that the family relationships deteriorated but do not agree on the cause. The cause is probably irrelevant.¹

¹ Edward Burke and Bernardine Donelson testified that family relationships were very close when the family was younger, and that the family began to drift apart but still maintained "relationships" until February, 1996 when Edward Burke left the store. Their recollection is probably the most accurate.

2. THE GROWTH OF THE FAMILY BUSINESS:

Not only did Edward build the business in the normal sense of the word, he literally and physically built the building in which the market is located today. He performed all of the construction work, together with his father, to renovate the restaurant and two separate buildings and businesses into what is now Bunny's Superette. He converted part of the house that is now the market into a boarding house and maintained it. Bernard Burke and Edward Burke were literally building the store, while Bernard Burke was also on the road selling life insurance in order to get cash for further materials and renovations. During this time, Edward, Marie and Bernardine worked in the store until it was finished, and up and running, at which time Marie Burke was able to stay at home as a housewife.

Edward Burke testified that he did not attend college because he had no real option and was working night and day to build up the business and trying to build the family's future. Although Thomas and Bernardine attended college, the tuition was inexpensive and they lived at home and they worked in the business after school. Thomas attended a two-year college then known as New Hampshire College of Accounting and Commerce and Bernardine went to college at Notre Dame college, but she continued to work in the store after school and on weekends.

Edward Burke continued working with his father while Thomas was still in school. He and his father bought a market on Rockland Avenue on the West Side of Manchester. They bought a store (Tom Thumb) in Massachusetts and Edward took its entire contents, including inventory and equipment, and installed it in the Rockland Avenue store. Then, he opened the store and began running it, with the assistance of his father and Bernardine.

Bernard Burke and Edward also bought another market on Elm Street in Manchester, named Rydall's Market. It was operated only for six to eight months because, in Edward's opinion, it was a mistake to have purchased it, as it was an ethnic market. Prior to Bernard's death, both Rydall's Market and the market on Rockland Avenue were sold. Bernard Burke had had a myocardial infarction and Edward sold the Rockland Avenue business, but retained and continued to rent the land and building on which it was situate to the new owners of the store. All of these transactions, including the building of Bunny's Superette, the Rockland Avenue store and Rydall's Market, together with other real estate purchases and the proceeds of the sale of Rydall's Market and the Rockland Avenue store were all considered to be a part of the family business. The business was in the name or names of Bernard and Marie Burke, but, nevertheless, considered as part of the one business.

Approximately in 1966, the Internal Revenue Service audited the business. Bernard Burke was not a good bookkeeper and the accountant for the business advised Edward to handle the finances of the business. He then did so until he left Bunny's Superette in February, 1996.

Thomas Burke did not work in the family business until the late 1960s. Bernard Burke told Edward that Thomas was to return to the business, and although Edward did not think that he should, acceded to his father's wishes. Bernard Burke repeated to Edward that the business continued to be owned by everyone equally, and that included Thomas, whether he was working at the store or not, and Bernardine whether or not she was working in the store.

In 1971, after Bernard Burke's death, all parties agreed to continue the agreement that all four owned the business and all real estate and personal property generated from the business over the years. Marie Burke had little, if anything, to do with business affairs of any sort after 1971, including the incorporation. She told Edward Burke, as he testified, to simply do what he thought was fair. He and Thomas consulted Attorney Charles Dunn and he advised them to incorporate, and so they did. The incorporation was not considered by Edward Burke to be a "gift" from Marie, since he already owned his one-fourth share. Further, the parties agreed that the real estate would continue to remain in Marie's name for income and tax purposes, but would be owned by all four equally and, on Marie's death, by the three children equally. In so holding the real estate, the rental income would be paid to Marie and this income would replace the income lost from Bernard Burke.

3. MARIE BURKE'S ESTATE IS THE FRUIT OF BUNNY'S MARKET:

Bernard Burke's estate was insolvent: he owed more than he owned. The probate of the Estate of Bernard Burke (See, Defendant Thomas Burke's Exhibit A) indicates that there was an inventory of personal property of \$71,000.00 consisting of motor vehicles and the business of Bunny's Superette valued at \$68,913.00. The final account filed and approved by the Probate Court listed debts of \$63,774.00 and consisted of five (5) bank loans totaling \$38,990.00. Four (4) of these bank loans were presumably secured by the property then owned by Bernard Burke and Marie Burke; i.e., the land and buildings on Pine Street, the house on Arah Street, 68 Webster Street, and land and buildings at Rockland Avenue. Also listed were real estate taxes in the amount of \$4,664.00, \$7,200.00 for air conditioning for Bunny's Superette, and \$2,570.00 of miscellaneous debt. In section 3 on Form 101, as jointly held property, were listed the four (4) parcels of real estate (Arah Street, Rockland Avenue, 68 Webster Street and

the two parcels which comprise the land and buildings for Bunny's Superette at 77 Webster Street and 753 Pine Street). Also listed were miscellaneous stocks and bonds in the amount of \$63,530.00, for a total of currently-held property valued at \$184,216.00. The values were accepted by the Internal Revenue Service and a Closing Letter issued.

The Plaintiff, Edward Burke, testified that Bernard Burke was essentially insolvent. The real estate was encumbered by mortgages and the banks called the same and required him to make arrangements to pay the same off. He was able to re-arrange the business cash flow to do so. He was also of the opinion that, with the exception of one stock, the stocks and bonds held by his father were essentially of no value. The Plaintiff's opinion of the value of the stocks and bonds was essentially correct because by November, 1984, the value of Marie Burke's portfolio was \$3,610.95. The Plaintiff, Edward Burke, testified that the business was really worth little or nothing unless he and his brother, Thomas Burke, continued to work. Accordingly, the family agreed to their continued co-ownership in the business and the real estate to provide an incentive for Edward Burke and Thomas Burke to continue working, and by leaving the real estate in Marie Burke's name, to allow Bunny's Superette and the other rental properties to pay rent into the "real estate account" controlled by Edward Burke and Thomas Burke, for Marie Burke's benefit. The balance of the agreement, of course, was that any additional real estate or assets accumulated by Marie Burke as a result of this agreement would continue to be owned by the family as a group, in equal shares, particularly if the same were the proceeds of the rental income of the property owned by the family, or the sale of the same.

Marie had no income from any source other than Bunny's Superette. Thomas and Edward Burke testified that the business was really not worth anything unless one or both agreed to continue running the store. The real estate was worth very little in 1971, and its value was offset by mortgage indebtedness. It was only because of Thomas and Edward's continued efforts (and to some extent Bernardine's) that the real estate was able to generate income for Marie and, ultimately, to increase in equity. Further accretions to the real estate (100 Webster Street and Liberty Street) were likewise derived from the profits of Bunny's Superette and the efforts of Edward and Thomas Burke. The real estate and Marie Burke's personal estate are the direct result of the profits generated from Bunny's Superette and the efforts of Thomas and Edward Burke, and are subject to the agreement that the parties made in 1971.

The deal Marie Burke made in 1971 was a good one: at the time she was insolvent and had no income.

She has had over thirty-five years of substantial income and comfortable living. She has never had to write a check, has had all of her expenses paid by the "real estate account," and when she became sixty-five cashed her Social Security checks to spend as she wished. She has seen her real estate increase in value and has been able to accumulate a portfolio of approximately \$250,000, over half of which is from the proceeds of the sale of the premises at 100 Webster Street and the premises at Rockland Avenue. The agreement made in 1971 has served Marie Burke well and is certainly adequate consideration for her promise to treat her three children equally.

Meanwhile, Thomas and Edward continued to work long hours nearly every day after 1971, and never would have done so had they not considered themselves to be equal owners of the family property with Marie Burke. After Bernard Burke's death in 1971, Edward Burke's financial duties included addressing all of his mother's personal needs as well as the family business. The business and money of the family was so integrated that, pursuant to the agreement, rent from Bunny's Superette as well as the other real estate owned was paid into a joint account in the names of Edward and Thomas Burke, in which each had signatory authority, and maintained by Edward Burke in the store office by the store bookkeeper. The checks were signed by Edward Burke, for the most part. The income into this account was consistently considered as part of the agreement of the parties. The account was referred to throughout the course of the trial variously as the "real estate account," "Marie's personal account," or the "joint account." All of the income from the rental property went into Marie's account, as well as a small salary from Bunny's Market which was also paid into that account, although she no longer worked in the store. All expenses from the rental property were paid from the account, as well as all of Marie Burke's personal expenditures. Marie's personal expenditures ranged from items as small as magazine subscriptions, to utilities, heating, real estate taxes on her house, Macy's bills, Filene's bills, and any other day-to-day expenses of living. There were periodic checks to cash for Marie as well. (See, Defendant Thomas Burke's Exhibit A).

Marie's estate was further augmented when Thomas and Edward purchased the 100 Webster Street property and the Liberty Street property and put the same in Marie's name. Marie Burke was unable to testify as to where and how the cash was derived for the purchase of these properties. Thomas and Edward Burke agreed that the cash for the two properties came from refinancing the 68 Webster Street Property. Purchase money mortgages were given to the Manchester Federal Savings & Loan Association. 68 Webster Street had been purchased by Bernard Burke prior to his death in 1971, using the only income that he had, the profits from Bunny's Superette. All of the real estate that Bernard Burke purchased in his name as joint tenants with Marie also was derived from the profits

from Bunny's Superette and was part of the family business and enterprise, of which each of the parties owned an equal share.

In addition to purchasing the property by re-financing 68 Webster Street, Thomas and Edward Burke obtained tenants for the property, collected rents, arranged for the performance of repairs, maintained the books and records, deposited all rents to the credit of Marie Burke (albeit in the joint checking or real estate account) in accordance with their agreement, and wrote every single check. Marie Burke never wrote a check in her life, at least after Bernard Burke's death in 1971. All expenses with respect to the rental property were also paid through the same account, such as the mortgage, taxes, repairs, utilities, and fuel. Any equity that accrued in the properties came from a combination of the initial down payment from the re-finance of 68 Webster Street (which in turn came from the profits of Bunny's Superette), as well as the efforts of Edward and Thomas Burke. The real estate at 100 Webster Street, Liberty Street, and Rockland Avenue, as well as Arah Street, and the proceeds of the sale of any of that real estate, are all derived from the profits of Bunny's Superette as well as the efforts of Edward and Thomas Burke and, to some extent Bernardine (who acted as a realtor for 100 Webster Street and the Rockland Avenue sales). The real estate was clearly part of the family enterprise and the agreement made. Marie Burke did nothing with respect to the purchase, repair, rental, financial, mortgage, payment of the mortgage, maintenance, and/or sale of the properties. Edward and Thomas Burke performed all of such duties.

4. 1996 THEFT:

The Defendants suggest that Edward Burke left the business of Bunny's Superette in February, 1996 voluntarily and, accordingly, should forfeit any and all rights that he has under the agreement. It is the Plaintiff's position that he had good cause to leave the business insofar as he was employed, and that the agreement never required that any of the parties continue to be active employees in order to retain their ownership interest. Bernardine is a full-time realtor and helps out only very occasionally, and is still considered to be an equal one-fourth owner. Marie does not work at all and is considered to be an equal one-fourth owner.

On one evening in February, 1996, Bernardine was helping in Bunny's Superette. She found a slip of paper under a cash register with a series of numbers on it. Bernardine testified that in her opinion, the numbers, which were a series of typical grocery items in such odd amounts such as \$2.94, \$14.10, and \$1.14, most likely represented theft. She was unable to think of any other purpose for such a slip of paper other than theft. She testified further that

whoever was stealing from the cash register by not ringing those amounts up was stealing from the entire family, i.e., all four parties, and not just "Bunny's Superette, Inc."

Edward Burke testified that his sister gave the slip to him and he thought that one of the employees was the thief and told her that he would put it back and keep a camera on the register to find the guilty person. He further testified that both he and his sister agreed that the slip could only represent stolen money. Edward Burke discussed the matter with his brother Thomas the next day and, to his surprise, Thomas explained that the slip was his and said that he had expenses for which he needed the money. Edward was so angry that his brother had stolen from the family that he left the store that very morning. He testified that he told Marie Burke and that her response was surprising: she told him that he could start another business more easily than Thomas. (Edward had, in the prior few months, financed and assisted his son, Jonathan, in opening a market across town called Jon O's, and Edward could work there, Marie said.) Edward testified that he told his accountant, Mr. Paradis, as well as his lawyer about the theft, and the lawyer advised him to call the police. Edward testified that he did not call the police because it was a family matter and that he did not want to injure his mother's health. Edward testified, in hindsight, that he should have asked Thomas to leave instead of leaving himself. In any event, his opinion is that he left only his employment behind and not his ownership interest.

5. CHRONOLOGY:

The Plaintiff submitted a chronology at the beginning of this Trial as a possible aid or assistance to the Court. A copy of the same is attached to this Memorandum for ease of reference. The Chronology is intended to be an aid in reviewing those events and documents which demonstrate that Thomas Burke exerted undue influence over Marie Burke, causing her to breach the oral agreement, with the assistance and knowledge of Bernardine.

All overt acts prior to January 7, 1999 were consistent with the oral agreement between the parties. Marie Burke testified that she had no will prior to January 7, 1999. Accordingly, had she died at any time prior to January 7, 1999, she would have died intestate, her estate being divided equally among the three children. The testimony indicated that all assets were in her sole name, with the exception of the joint checking account or "real estate account", which account was in joint names with Thomas Burke but which Thomas Burke agreed was really the property of Marie Burke.

Secrecy is the hallmark of fraud, duress and undue influence. Thomas Burke began to isolate and influence Marie years before 1999.

The Rockland Avenue real estate and 100 Webster Street properties were sold in January, 1987 and, although Edward was of the opinion that the proceeds should be distributed at that time to all four equally (Marie, Thomas, Edward and Bernardine), the net proceeds of both sales, in the total approximate amount of \$150,000, were deposited into the "real estate account". In 1985 or 1986 Thomas had taken the real estate account to his home and began to control that account and all his mother's other accounts and financial affairs. He maintained the real estate checking account at his home, rather than in the office at Bunny's Superette, and had all of the checking account statements and canceled checks returned to his home. He changed the account from a joint account with Edward Burke and himself, to a joint account with Marie Burke and himself. Thomas testified that he also received all of Marie Burke's portfolio statements from Merrill-Lynch and prepared her financial affairs in a summary for her accountant for her annual tax returns. Edward Burke no longer had any control or knowledge of Marie's financial affairs.

Thomas Burke testified that even though the account was jointly in his name and Marie's, he considered it to be her account. Throughout the course of the trial, the Defendants made much of the fact that the real estate involved in this matter and any personal property generated by the operations of the real estate and Bunny's Superette were in the name of Marie Burke and therefore, she is the "legal owner." The Defendants cannot have it both ways: Thomas was not a "legal owner" of the joint account as its true ownership was governed by the oral agreement between the parties. Likewise, the fact that the real estate and business of Bunny's Superette was at any time in the names of either Bernard and Marie Burke, or at a later time, in the name of Marie, is not conclusive on the question of who is the true owner of the same.

The preparation for and execution of the January 7, 1999 will and Trust were carefully planned in advance, shortly after Edward left the store. Thomas testified that in 1997, shortly after Edward left the store, Fremeau Appraisal Associates was retained to appraise all of Marie Burke's real estate and John Crafts Appraisal Associates was retained to appraise the land and building occupied by Bunny's Superette. Thomas Burke testified that he received the bills for these appraisals and paid for the same by checks from the joint account he had with Marie. Thomas also testified that the appraisers were hired to produce the appraisals in preparation for the arrangement of Marie Burke's affairs. Thomas testified that he did not know what values the appraisers had placed on the properties

and declined to produce copies of the appraisals. Edward Burke was not made aware of the existence of the appraisals, the purpose for the same, or the values that were placed on the family properties by the appraisers.

On January 7, 1999, Marie Burke executed a series of documents prepared by Attorney Ansell: (1) A will (see Plaintiff's Exhibit 4); and (2) a Revocable Trust (see Plaintiff's Exhibit 1). Please note that in the chronology supplied to the Court, this Trust was incorrectly referred to as an Irrevocable Trust. The will is a pour-over will into the Marie Burke Revocable Trust.

On March 22, 1999, Marie conveyed all of her real estate to the Marie Burke Revocable Trust, which deed was recorded in the Hillsborough County Registry of Deeds at Volume 6080, Page 1120. See, Plaintiff's Exhibit 5.

Sometime in March, 2004, Thomas Burke proposed to Bernardine that she give him her shares of stock in Bunny's Superette and that their mother do likewise. Bernardine testified that she discussed this proposal with Thomas and with her mother, perhaps in separate meetings, and knew that the gifts would give Thomas seventy-five percent control of the stock of Bunny's Superette, Inc. She also must have known, however, that her mother was not only making the same gift of stock, but also was going to convey the land and building in which Bunny's Superette was located (a very substantial value, even though Edward Burke was not allowed to testify to its value) and that her mother was to execute the First Amendment to the Trust, which limited the amount that Bernardine would have to pay Thomas for the Liberty Street property to \$90,000 (instead of a presumed fair market value of something in excess of \$250,000), and retained to her the residue of her mother's estate consisting of the Arah Street property and 68 Webster Street property, each with a value of approximately \$250,000 as well as the portfolio of the stocks, bonds and cash of approximately \$250,000). Bernardine, accordingly, had nearly a \$1,000,000 incentive to sign the "gift letter" over to Thomas. The exchange was that Thomas was to receive 75% of the store and the land and building on which it was situate and Marie would make the Amendment to this Trust in such a fashion that Bernardine would retain her residuary interest, as well as giving to Thomas a "discount" on the price at which he was to pay to purchase the Liberty Street property. These considerations are the quid pro quo for Marie's transfer of the stock to Thomas. In this family, as Marie testified, family and money were about "even steven" and Thomas and Bernardine each received approximately \$1,000,000.00 for their participation in the breach of the oral agreement.

On March 17, 2004, the Marie Burke Revocable Trust conveyed the land and building upon which Bunny's Superette is situate to Thomas Burke. The deed is recorded at Volume 7187, Page 2575 of the

Hillsborough County Registry of Deeds.

Bernardine testified that on or about April 1, 2004, Thomas brought a letter (the so-called "gift letter") (see Plaintiffs Exhibit 7) to her and said that she should sign it. She testified that she had already agreed to do so (pursuant to the deal outlined above, presumably) and did not know who prepared the letter. Also, on April 1, 2004, Marie signed a letter to Attorney David Dunn indicating her intent to give her stock in Bunny's Superette, Inc. to Thomas.

Four days later, on April 5, 2004, the First Amendment to the Trust was signed by Marie Burke, in Attorney Ansell's presence. (See Plaintiff's Exhibit 2).

On April 4, 2004, Attorney Cohen, Attorney Lamontagne's partner in the Devine & Millimet law firm, called Attorney David Dunn to tell him that a letter was coming. (See Plaintiff's Exhibit 26).

On May 4, 2004, an undated letter was sent from Thomas Burke to David Dunn, Esquire, requesting that he call a special meeting for the purpose of electing Thomas Burke as the sole director and for the adoption of the new By-laws which effectively eliminated any right or control by the remaining twenty-five percent stockholder, Edward Burke. (See Plaintiff's Exhibit 26). Edward Burke testified that the first time he received any notice that any of the transfers, arrangements and schemes by the Defendants were occurring was when Attorney David Dunn gave him a copy of the corporate books and of the letter from Thomas.

On May 6, 2004, Attorney David Dunn gave the Plaintiff a copy of the corporate books and records, as well as Thomas's letter. (See Plaintiff's Exhibit 26).

On May 10, 2004, Plaintiff's counsel wrote to Attorney David Dunn requesting an accounting and requesting that he not call the special meeting. (See Plaintiff's Exhibit 25).

On May 27, 2004, Attorney David Dunn resigned as Secretary of the corporation and as counsel to Bunny's Superette, Inc.

On June 8, 2004, the instant Petition for Injunction was filed by the Plaintiff.

On June 21, 2004, the Defendant, Marie Burke, had been served and the Return of Service filed with the Court.

On June 29, 2004, Marie Burke executed the Second Amendment to the Trust. (See, Defendant, Thomas Burke's Exhibit 3). In this Amendment, in Article 22, Marie Burke intentionally made no provision for the Plaintiff, Edward Burke. This transfer and any other transfers made after the institution of suit, including the amendments to a

revocable trust, are likely considered as fraudulent transfers pursuant to the New Hampshire Fraudulent Transfer Statute. (See, RSA § 545-A:4).

The Plaintiff Edward Burke's share of his mother's estate, until 1999, was one-fourth of all property which she owned, both real estate and personal property, and one-fourth of the business of Bunny's Superette, or at Marie's death, a one-third share equally with Thomas and Bernardine. On January 7, 1999, his interest was reduced to \$100,000, (together with the twenty-five percent stock ownership of Bunny's Superette, Inc.) On April 5, 2004, the First Amendment to the Trust reduced his share further to \$60,000. His one-quarter share in Bunny's Superette, Inc., would be worth very little in view of the seventy-five percent share that had been transferred to Thomas Burke three days earlier, on April 1, 2004, as well as the amended corporate documents making Thomas the sole director. On June 29, 2004, the Second Amendment to the Trust made no provision for the Plaintiff, Edward Burke, taking from him all of his interest in the family property, except for the questionable value of twenty-five percent of the stock. Not only was all of this property taken from and transferred away from Edward Burke, but also was effectively placed in the control of Thomas because of the undue influence he exerted over Marie. On September 3, 2004, by the Amendment of Article 7 in the Third Amendment to the Trust, making Thomas Burke the Trustee with sole discretion over Bernardine's residuary share, Thomas had taken control of the entire property of the family.

6. UNDUE INFLUENCE:

Prior to 1999, Thomas Burke had taken possession of the "real estate account" and Marie Burke's financial affairs so completely as to control them to the penny, stolen money from Bunny's Market (presumably knowing that Edward's sense of integrity was such that he would probably not call the police). The preparation for and execution of the January 7, 1999 will and Trust were carefully planned in advance, shortly after Edward left the store. Thomas testified that in 1997, Freneau Appraisal Associates was retained to appraise all of Marie Burke's real estate and John Crafts Appraisal Associates was retained to appraise the land and building occupied by Bunny's Superette.

Thomas Burke testified that he received the bills for these appraisals and paid for the same by checks from the joint account he had with Marie. Thomas also testified that the appraisers were hired to produce the appraisals in preparation for the arrangement of Marie Burke's affairs. Thomas testified that he did not know what values the appraisers had placed on the properties and declined to produce copies of the appraisals. Edward Burke was not made aware of the existence of the appraisals, the purpose for the same, or the values that were placed on the family properties by the appraisers.

Sometime prior to January 7, 1999, Thomas Burke brought Marie Burke to the Law Offices of Devine, Millimet and Branch to meet his lawyer, Attorney Ovide Lamontagne, with respect to "estate planning", and then upon a referral from Attorney Lamontagne to Attorney Ruth Ansell, who oddly enough continued for some number of meetings to meet with Marie Burke at the Devine, Millimet law firm. Thomas Burke and Marie Burke testified that Thomas drove Marie to all of these various appointments at the Devine, Millimet law firm and, subsequently, to a number of appointments at Attorney Ansell's office in Bedford. Attorney Ansell was not, in 1999, and is not now, a member of the Devine, Millimet law firm.

On January 7, 1999, Marie Burke executed a series of documents prepared by Attorney Ansell: (1) A Will (see Plaintiff's Exhibit 4); and (2) a Revocable Trust (see Plaintiff's Exhibit 1). Please note that in the chronology supplied to the Court this Trust was incorrectly referred to as an Irrevocable Trust. The will is a pour-over will into the Marie Burke Revocable Trust).

Thomas Burke testified that he had received Attorney Ansell's bill for these documents in 1999 and paid for the same from a check written from the joint account which he had with Marie Burke. Thomas Burke denied having read the will or any of the other documents, even though Attorney Ansell testified that she had prepared drafts for Marie Burke to review before coming to her office to sign the same, and even though Marie Burke testified that these documents were of the type that she would not sign without consulting with Thomas Burke. When asked as to whether or not Thomas Burke had reviewed the same before Marie executed them, Marie identified specifically her will and the original Marie Burke Revocable Trust, on the record and by exhibit number, as two of the documents that Thomas Burke did review before she signed the same. When she was asked a question regarding each and every one of the above-identified documents as well as subsequent Amendments to the Trust and deeds, she was unsure with respect to one or two of the documents as to whether or not Thomas Burke had reviewed the same, but did testify that he reviewed the original will and Trust Indenture.

Marie Burke testified that she relied on Thomas Burke for any important business matters and would generally not sign documents such as these without his advising her to do so, and would sign such documents if he advised her to do so, because he had her best interests at heart and she trusted him. She testified that he was always there for her and that she had total faith in what he told her to do.

Marie Burke was asked to identify the documents noted above, as well as the Amendments to the Trust Indenture, Plaintiff's Exhibits 2, 3, Defendant, Thomas Burke's Exhibit 3. She was asked to identify each document by exhibit number or at least describe what the document was. She was unable to identify any one of the documents, including, but not limited to, her Will and the Trust Indenture for the Marie Burke Revocable Trust, even though she reviewed each and every document for a long period of time, spending five minutes or more on each of the various documents.

It is respectfully suggested to the Trial Court that not one lawyer in the Courtroom on either side of this case would have allowed the execution of a Will or a pour-over Trust by Marie Burke based upon her obvious inability to understand the nature of the documents that she was reviewing and because of the clear and obvious controlling influence which Thomas had over Marie. Marie would sign whatever Thomas asked her to without knowing what she was signing, and would decline to sign whatever he asked her not to sign.

The Defendant, Marie Burke, may not now be heard to say that she was competent on January 7, 1999 when she executed her will and Trust Indenture, or that she was not under undue influence of Thomas Burke such that her acts were not her own and voluntary acts. She was not competent to execute such documents on the day of trial. Attorney Ansell represented to the Court that Marie Burke was "at her best" the first thing in the morning and the Plaintiff, Edward Burke, agreed to allow her to testify as the very first witness in the morning. Attorney Ansell, presented no evidence that Marie Burke was more competent in 1999 than she was on the day of the trial. She was clearly not competent to execute a will and pour-over Trust, and was not even competent to execute the two deeds (Plaintiff's Exhibits 1 and 4), which she was also asked to identify and was unable to do so. Marie Burke was not questioned by Attorney Ansell as to whether or not she understood what the documents were on January 7, 1999 when she signed the same, whether or not she was able to read and understand the same on January 7, 1999 when she executed the same in Attorney Ansell's office, and whether or not on January 7, 1999, Thomas Burke still exerted the same degree of influence over her as that to which she testified in the trial of this matter.

Attorney Ansell did not even ask Marie Burke whether or not the Will had been read to her in Attorney

Ansell's office and whether or not the pour-over Trust and the various Amendments to the Trust had been read to her in her office. Clearly, she was unable not only to identify the documents while on the witness stand, but also was unable to read either the title or the contents of the same. Attorney Ansell merely asked Marie Burke whether or not she and Marie had "reviewed" her will and Trust when she came in the office to sign the same. The only other rebuttal evidence offered by Attorney Ansell was to ask Bernadine Donelson whether or not the documents set forth above reflected Marie Burke's desires with respect to the disposition of her estate, without even identifying at what point in time she was being asked to speculate on her mother's "desires".

Bernadine Donelson testified that she had only seen those documents within the last week or so, but that they did appear to reflect her mother's desires. On the other hand, Bernadine testified that she had never seen these documents before and had never discussed with her mother the disposition of her mother's estate. If she had never discussed the disposition of her mother's estate prior to the trial date, how could she possibly have known what her mother's intentions were on January 7, 1999 with respect to the disposition of her estate when she executed her Will and Revocable Trust?

The Will and Trust Indenture are also internally troublesome. The Will nominates Omer Roy, a store employee, as the Executor, Sean Burke as the Alternate Executor, and as the second Alternate a corporate trustee designated by Bernadine Donelson. But, the will also provides that "my brother may receive reasonable fees" as Executor. Edward Burke and Marie Burke testified that Marie's brother on January 7, 1999, was Frank Kearns. This relatively minor portion of the will is nevertheless significant. It indicates that Marie never read the will, or if she read it did not understand it, or if someone had read it to her that neither the person reading it to her, nor Marie Burke, understood the will. It should also be noted that Marie Burke mistakenly signed the will in the first instance, by mistake, in the space set aside for the date and was presumably instructed to cross out that signature and sign on the correct line. Finally, there was a provision that upon a contest of the will, the person contesting would receive no property.

On January 7, 1999, Edward Burke had no knowledge that such a will had been executed. There were no events within the family that would suggest that the agreement among the parties which had existed for nearly fifty years was about to be breached by the execution of this will, even though Edward had left Bunny's Superette three years previously, after Thomas had been caught stealing. Thomas and Bernadine Donelson deny knowing of the existence of the will or of the contents of the will. Thomas knew all other aspects of his mother's life and totally

controlled her financial affairs to the point of driving her to and from her various appointments in preparation for the execution of the Will and Trust and ultimately receiving and paying the bill for the same. He reviewed the Will before Marie executed it and paid for the Will. Bernardine testified that she had not seen the Will and Trust until a week prior to the Trial. The only person who would have reason to fear a will contest and to have requested the insertion of such a provision in the Will and Trust Indenture was Thomas Burke.

Marie Burke's will provided that her assets poured over into the Marie Burke Revocable Trust, the Indenture for which was also executed on January 7, 1999. The Trust provides, in Article 7(i), that if Thomas survives, all of Marie's stock in Bunny's Superette and the real estate on which it is situate (Tax Map 35, Lots 28 and 29) are left to Thomas. It is highly unlikely that Marie was able to find the Tax Map and lot numbers for the land and buildings. It is far more likely that Thomas provided that information to Attorney Ansell, knowing that the stock and the land and buildings were to be left to him in the Trust Indenture. It is also far more likely than not that he had requested his mother to make such a provision and used his influence to persuade her to do so.

In Article 7(ii), the Trust provides that Thomas has an option to buy the property on Liberty Street at a price to be set by the Trustee. The Liberty Street property is important to the operations of Bunny's Superette because not only does it abut the store but its rear yard provides space in which Bunny's Superette may place a dumpster for its garbage.

The Trust further provides that if Thomas does not exercise the option, the Trustee may sell the Liberty Street property to any person except to Marie's sons, Thomas and Edward. This provision, which may well not be enforceable, certainly suggests that someone is extraordinarily angry with and spiteful of Edward in providing that he cannot even buy a piece of property for more than fair market value. It is far more likely that Thomas placed such a provision in the Trust than Marie by her own independent decision.

Likewise, Article 7(iv) leaves \$100,000 to Edward Burke, in trust, however, with the Trustee to distribute only the income to him. At Edward's death, the \$100,000 is to be left equally to Carolyn Martindale (Edward's daughter) and Marie Donelson (Bernardine's daughter). Nothing is left to Edward's son, Jonathan, but it is more likely than not that Thomas Burke supplied the name Carolyn Martindale. Marie Burke, who had been carefully rehearsed for the question in Court, was asked to name her grandchildren on the witness stand. She was able to name many of them by their first names, but none by their last names, forgot one of the grandchildren, (Thomas' daughter Patricia who has cerebral palsy), and gave no indication that she would have known that Carolyn's married

name was Martindale. In fact, she testified that she did not know Edward's children or his grandchildren. Also, leaving Edward the income only on the \$100,000 bequest is a fairly sophisticated slap in the face for the years of work, time and effort he expended on behalf of the family enterprise, pursuant to the family's verbal agreement. Again, it is far more likely that this provision was inserted into the Trust by Thomas Burke, who appeared to demonstrate far more vindictiveness towards Edward than did Marie.

Finally, Article 7(v) leaves the rest and residue of the estate to Bernardine Donelson. This residual bequest or distribution is of substantial value. Marie Burke's portfolio of stocks and bonds approximates \$250,000. In addition, she also owns property at Arah Street, Liberty Street, and 68 Webster Street, each of which would conservatively be valued at \$250,000. Although Edward Burke was not allowed to testify as to the fair market value of these properties, the Court may take judicial notice that they are of some significant value and that this residual bequest in and of itself is worth approximately \$1,000,000. If Bernardine Donelson knew of the substance of the provisions of her mother's Trust, then she knew of this provision as early as 1999. Her actions thereafter, must be reviewed in light of her knowledge that she was a substantial beneficiary of her mother's estate and that her mother's financial affairs were totally controlled by her brother, Thomas, and that in order to maintain the substantial bequest to her, she would have to appease Thomas and accede to his requests in the future. Moreover, if Bernadine has been allocated property worth \$1,000,000.00, we can be sure that the land and building on which Bunny's is situate and stock in Bunny's is worth at least \$1,000,000.00.

The original 1999 Trust Indenture also provides in Article 7, Section B(i) that if Thomas does not survive Marie, the stock in Bunny's Superette and the land and buildings, is to be sold to any person except to her son, Edward. Such a provision would only been written by Thomas Burke. It was Thomas who was caught stealing the money from Bunny's Superette by Edward and the only person who would be capable of such vindictiveness. Marie and Bernardine had no reason to exclude Edward from the store in the event that Thomas deceased. In fact, Marie Burke continued, even as late as 1999, to be dependent on the income received from the rentals, and from Bunny's Superette, as well as the other real estate. This income paid all of her expenses. A sale of the market to third parties would substantially reduce the family income. Granted that the provisions of Article 7B would not be effective until first Thomas and then second, Marie died, the Trust makes no provisions for what would be done in the interim between Thomas' death and Marie's death. The only logical person to continue running Bunny's Superette and to generate the income needed by the family was Edward.

If Edward would have been told about the provisions of Article 7B, he more likely than not would not have returned to continue running the store if Thomas died because it would have been the loyal thing to do.

Accordingly, Thomas, Marie and Bernardine never told Edward that such a provision existed. If Thomas died, Edward would continue his loyalty to the family and return to run Bunny's Superette, to the advantage of the entire family.

Article III of Section B of Article 7 of the Trust provides that if Thomas predeceased Marie, the rest and residue was to be divided in three equal shares, Edward's share to be held in trust with the income only payable to him. Again, this provision appears to have been one that Thomas would have requested, rather than Marie.

On March 22, 1999, Marie conveyed all of her real estate to the Marie Burke Revocable Trust, which deed was recorded in the Hillsborough County Registry of Deeds at Volume 6080, Page 1120. See, Plaintiff's Exhibit 5. On March 17, 2004, the Marie Burke Revocable Trust conveyed the land and building upon which Bunny's Superette is situate to Thomas Burke. The deed is recorded at Volume 7187, Page 2575 of the Hillsborough County Registry of Deeds.

Thomas Burke testified first that he had never seen the deed himself, then that Marie Burke had told him about it, and then later that he had seen the deed. There really was no reason for Marie to have conveyed the land and buildings to Thomas. She had breached the oral agreement by executing the Will and Trust Indenture. She had purported to leave Thomas the property in the Trust and he was also left her shares of stock in Bunny's Superette, Inc. The only plausible explanation for this deed, and the series of events that followed, was so that Thomas could have total direct control over the family's property during his lifetime, rather than the indirect control he had previously exercised by influencing Marie. Prior to March 17, 2004, he controlled every aspect of Marie's life. Apparently this control was no longer sufficient, or he was concerned that her competence might be questioned, and he decided to exert direct control over the various family properties.

Accordingly, sometime in March, 2004, Thomas Burke proposed to Bernardine that she give him her shares of stock in Bunny's Superette and that their mother do likewise. Bernardine testified that she discussed this proposal with Thomas and with her mother, perhaps in separate meetings, and knew that the gifts would give Thomas seventy-five percent control of the stock of Bunny's Superette, Inc. Bernardine testified that she discussed this proposal with Thomas and with her mother, perhaps in separate meetings, and knew that the gifts would give Thomas seventy-five percent control of the stock of Bunny's Superette, Inc. She also must have known, however,

that her mother was not only making the same gift of stock, but also was going to convey the land and building in which Bunny's Superette was located (a very substantial value, even though Edward Burke was not allowed to testify to its value) and that her mother was to execute the First Amendment to the Trust, which limited the amount that Bernardine would have to pay Thomas for the Liberty Street property to \$90,000 (instead of a presumed fair market value of something in excess of \$250,000), and retained to her the residue of her mother's estate consisting of the Arah Street property and 68 Webster Street property, each with a value of approximately \$250,000 as well as the portfolio of the stocks, bonds and cash of approximately \$250,000). Bernardine, accordingly, had nearly a \$1,000,000 incentive to sign the "gift letter" over to Thomas. The exchange was that Thomas was to receive 75% of the stock in the corporation and the land and building on which the store was situate and Marie would make the Amendment to this Trust in such a fashion that Bernardine would retain her residuary interest, as well as giving to Thomas a "discount" on the price at which he was to pay to purchase the Liberty Street property. These considerations are the quid pro quo for Marie's transfer of the stock to Thomas. In this family, as Marie testified, family and money were about "even Steven" and Thomas and Bernardine each received approximately \$1,000,000.00 for their participation in the breach of the oral agreement.

Bernardine testified that on or about April 1, 2004, Thomas brought a letter (the so-called "gift letter") (see Plaintiff's Exhibit 20) to her and said that she should sign it. She testified that she had already agreed to do so and did not know who prepared the letter, and on April 1, 2004, (see Plaintiff's Exhibit 7) Marie signed a nearly identical letter giving her twenty-five percent shares to Thomas Burke.

Four days later, on April 5, 2004, the First Amendment to the Trust was signed by Marie Burke. Clearly this Amendment had been discussed by and among Marie, Thomas and Bernardine when it was decided that the Trust would deed the real estate on which Bunny's Superette was situate to Thomas, rather than leaving it to him in the will and Trust at Marie's death, and amending Article 7 B to provide that Thomas had an option to purchase Liberty Street at the discounted price of \$90,000. Again, it is far more likely that Thomas, rather than anyone else, requested and inserted the provision for a discounted purchase price for Liberty Street since he would be the sole beneficiary of such a discounted price.

Article 7 C was amended to provide that the bequest to Edward Burke was reduced from \$100,000 to \$60,000 and, as above indicated, in Article 7 D, the residue was left to Bernardine. At this point, Edward Burke was still totally unaware that anything has changed with respect to the long-standing agreement which he understood was

still in effect.

Bernardine testified that Thomas had stolen money from the entire family in February, 1996. By September 3, 2004, he had stolen everything else.

7. THE STOCK SALE RESTRICTION DOES NOT ALLOW A GIFT OF STOCK:

Marie's testimony with respect to the agreement restricting the sale of the stock in Bunny's Superette, Inc. was that its intent was to prevent an outside third party from becoming an owner of the business. Edward Burke had testified that the agreement did not specifically address the issue of a gift of the stock, that it was not intended to address the issue, it was to prevent three family members from "ganging up" on one, and was intended to prevent the sale to an outside person. The business of Bunny's Superette continued to be owned by all four equally, even after its 1971 incorporation. The restrictions on the sale of the stock were designed to prevent not only a third party from entering into the family business, but also, as Edward Burke testified, to prevent three parties from "ganging up" on a fourth party, as has happened in the case at bar.

The agreement is silent with respect to whether or not the stock may be gifted. The purpose of the structure of the corporation is, however, clear that each of the parties are to own a one-fourth share. If a gift is permitted, it must be in such a fashion that the remaining parties continue to be equal owners, i.e., one-third or one-half owners as the case may be if either Marie, or Marie and Bernardine, were to make gifts of their stock. In any event, there was adequate consideration for the "gifts" of the stock by Marie and Bernardine to Thomas to require a finding that the transfer was, in fact, a sale and subject to the requirement that the stock first be offered to the corporation. If the stock had been offered to the corporation, as required, or a gift had been made to Thomas and Edward as was also required, then Edward and Thomas would be fifty percent owners of the stock rather than the claimed seventy-five percent/twenty-five percent ownership claimed by the Defendants.

8. COUNTERCLAIM:

Defendant, Bunny's Superette's, Exhibit 8 was the last exhibit of the trial. Attorney Normand proffered the same as the amount due by the Plaintiff, with imputed interest at the applicable federal rate. Counsel represented to the Court that he would verify the rate and either object or consent to the mathematics. The rate is properly

calculated and there is no objection to the admission of the exhibit.

The Plaintiff does not agree that he owes \$35,207.87, however. He testified that since 1971, when the corporation was formed, he and Thomas took equal salaries each year and would also take equal amounts throughout the year as "advances", "draw" or "loans to officer". He further testified that in every single year they would repay the loan or draw from the profits of the corporation at the end of the fiscal year. The corporation now, and since 1971, has had a June 30th fiscal year. Maurice Raymond, the corporation's accountant was unable to confirm or deny this long-standing practice described by the Plaintiff. Mr. Raymond had just taken over as its accountant a few months before the tax return for the year ended June 30, 1995 was prepared. In order to enter the amount of any advances or draws by Thomas or Edward he took the work papers of the prior accountant, Mr. Paradise. The Plaintiff testified that the tax return for the year ended 1994, Defendant, Bunny's Superette's, Exhibit B, could have been signed either by him or Thomas.

In an attempt to refute the Plaintiff's testimony the Defendants cross-examined him about the 1994 tax return, Schedule L, Column (b) which shows loans to stockholders on 7/1/94 as \$69,371 and on 6/30/95 as \$62,763. The Plaintiff testified he did not recall the 1994 tax return, and stuck to his memory that each year's profits since 1971 were used to pay any such loans. The Defendants did not produce any tax return except the one for the year 1994. Also, it should be noted that Defendant, Bunny's Superette's, Exhibits G and H do show payments by the Plaintiff to the corporation for this loan after 7/1/94, to wit: \$2,076.13 on 5/1/95. Likewise, after the fiscal year closed on 6/30/95, the Plaintiff is shown to have paid \$7,735.00 on 7/31/95.

The Plaintiff testified that profits of the corporation were always such that these loans were paid in full by the end of the fiscal year, if necessary either by accelerating income or deferring expenses. After he left in February, 1996 he was no longer in possession of the books, The 1994 tax return, Defendant, Bunny's Superette's, Exhibit B, is unsigned by either the accountant or the corporation. It probably was not due until October 15, 1995 and may have been late. In any event, Thomas Burke had control of the corporation's books and money and could choose to declare profits and pay these loans off or not, as he chose.

The plaintiff's position is that he owes the corporation nothing. There should have been adequate money to pay the loans in full throughout the year 1995/1996 and, certainly, by June 30, 1996 after he had left. Not only would the corporation have had adequate profits to pay the same in the ordinary course, it was not paying Edward's

salary and could have allocated those sums towards the loan. At the very most, the Plaintiff should owe no more than 7/12ths of the amount claimed or \$21,330.43 (7/12ths of \$36,566.45). He had worked 7 months of the fiscal year and at least 7/12ths of the profit should have been his and applied to the loan.

II. CONCLUSIONS OF LAW:

The argument herein incorporates some of the Requests for Rulings of Law filed with the Court at the beginning of the Trial.

1. ENFORCEABILITY OF ORAL AGREEMENTS TO HOLD OR LEAVE PROPERTY:

Oral agreements between parents and children to hold property in a certain manner or to leave an estate to children in such a manner is not unusual in New Hampshire jurisprudence. See, Tsiatsios v. Tsiatsios, 140 N.H. 173 (1995) and Shaka v. Shaka, 120 N.H. 780 (1980). Compliance with the Statute of Frauds or Statute of Wills is not required in order to enforce such an agreement. See, Foley v. Elliot Hospital, 98 N.H. 186 (1953); Boyle v. Dudley, 87 N.H. 282 (1935). The grounds for enforcing a contract include full performance, part performance, detrimental reliance, quantum meruit, fraud, undue influence, and other equitable considerations.

In Tsiatsios, supra, the decedent orally promised to bequeath a farm and motel to his children in exchange for their promise to provide services to him without monetary compensation. The children performed their part of the bargain for a good part of their lives, working hard from a young age and foregoing many youthful activities. The decedent often repeated his promise regarding his bequest of the real estate to the children in exchange for their services. After his wife died, the decedent hired a housekeeper and executed a will leaving the property to his female housekeeper. The jury found that the decedent had made an oral promise to bequeath his estate to his children in return for their contribution to the family finances. The Trial Court held that although ordinarily oral contracts to devise real property as compensation for personal services are unenforceable under the Statute of Frauds (see RSA 506:1), it does not fall within the Statute when some operating facts, such as fraud, part performance or other equitable considerations, are present. See, Ham v. Goodrich, 37 N.H. 185 (1858), and Weale v. Massachusetts Gen. Housing Corp., 117 N.H. 428 (1977). The Court held that the performance of the services

was substantial and it was not necessary that the children provide the services up until the day of their father's death. The oldest child began working for his father when he was very young and he was never idle. The agreement was the philosophy under which the family ran and the decedent repeated his promise "all the time". This evidence, which is remarkably similar to that in the case at bar, was held by the Supreme Court to sanction the existence of a valid offer, acceptance, and consideration.

Knox v. Perkins, 86 N.H. 66 (1932) considered verbal agreements made by and between the parent and two foster children. As in the case at bar, the agreement was not limited to specific property, but to the total assets of the estate on the theory that there was a valid and enforceable contract between the mother and the step-son to refrain from altering their wills. Performance by the mother of her part of the agreement would take the case out of the Statute of Frauds. See, Southern v. Kittredge, 84 N.H. 307. Likewise, the Statute of Wills would not be violated for such a contract is not a testamentary disposition of property. See, White v. Winchester, 124 Md. 518.

The Plaintiff has substantially performed the agreement by working for years and Marie Burke breached the agreement by transferring nearly all of her property to the Defendants before her death.

In the case at bar, the agreement between Mr. Bernard Burke and Marie Burke, and their children, was that all three of the children would be treated equally with respect to their parents' estate. This agreement was implemented, until 1999, by treating the property as equally owned during Marie Burke's lifetime and at her death by Mrs. Burke dying intestate or otherwise dividing her estate equally among her children. It was only in 1999 that Marie Burke actually or anticipatorily breached the agreement, because of the undue influence of Thomas Burke, and executed a will, Trust and deeds, in violation of the agreement.

This court has the authority to enforce an agreement by setting aside transfers by deed, or Trust, or modifying such instruments, and ordering specific performance of the agreement, and otherwise exercising all remedies which it has in equity, upon a showing that the parties executed deeds of conveyance, trusts, or other agreements due to fraud, duress, undue influence, deceit or misrepresentation. See Durkin v. Durkin, 119 N.H. 41 (1971). The court may grant reformation in proper cases where the instrument (in this case, the deed from Marie Burke to the Trust and then the Trust to Thomas Burke, as well as the pour-over trust and the various amendments to the Trust) fails to express the intentions that the parties had in making the original agreement to treat all members of the family equally. See, Erin Food Servs., Inc. v. 688 Props., 119 N.H. 232 (1979); Gagnon v. Pronovost, 97 N.H. 58 (1951).

2. UNDUE INFLUENCE:

The Defendant, Thomas Burke, unduly influenced the Defendant, Marie Burke, and to execute her will and Trust in 1999, and to convey real estate to Thomas Burke in 2004, and these transfers should be set aside.

In Edgerly v. Edgerly, 73 N.H. 407 (1905), the Supreme Court held that whenever it appears that the Donor was dependent upon or under the control of the Donee, and that the Donee took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence. In Edgerly, it could be further found that the Donee was the confidential advisor of the Testatrix with respect to all of her business affairs, and that she was dependent upon him and subject to his control in such matters and that her condition was such that she was hardly capable of forming new ideas but could be easily influenced to do as he wished and that the Donee was anxious to have her make a will in his favor and took her to a scrivener of his choosing who executed a will giving him substantially all of the property. Marie Burke was dependent on Thomas Burke and subject to his control and was easily influenced to make a will, Trust, and deed in his favor.

In Curtice v. Dixon, 74 N.H. 386 (1907), the New Hampshire Supreme Court considered the elements of undue influence in determining whether or not to set aside or compel the restitution of property transferred by one party to his niece upon the grounds of undue influence. The evidence was that the transferor was eighty-eight years old when the contract was made and that there were other nephews and nieces who had been treated equally in his will, prior to the transfer in question. The Supreme Court held that the Trial Court properly inquired as to whether or not the transaction was unjust and unreasonable, and that that finding would be evidence as to not only mental competence but as to undue influence. The decedent had the right to dispose of his property as he saw fit, but if the disposition was unreasonable or unjust or naturally to be expected, it may be considered as evidence of undue influence.

The disposition of Marie Burke's estate proposed by her will, revocable trust and amendments thereto, and the two deeds, is unreasonable and unjust in view of the agreement made by the parties and the adherence to the same for many years prior to 1999.

"Undue influence which will avoid a will is defined in the charge to the jury reported in *Whitman v. Morey*, 63 N.H. 448, 453, which so far as then in issue was approved in that case and is abundantly sustained by the authorities. 1 Jar. Wills (5th Am. ed.) p. 131, note E; *Small v. Small*, 4 Greenl. 220; s. c. 16 Am. Dec. 257, note; *Conley v. Nailor*, 118 U. S. 127, 135. *Mackall v. Mackall*, 135 U. S. 167,

172. It was there said of undue influence which will avoid a will "It is the use of such appliances and influences as take away the free will of the testator, and substitute another's will for his, so that in fact the instrument is not the expression of the wishes of the testator in the disposition of the property, but of the wishes of another. But where no fraud or deception is practiced, mere persuasion will not invalidate a will on the ground of undue influence. On the contrary, a testator may properly receive the advice, opinions, and arguments of others, and if, after all such advice, opinions, and arguments, the testator is not controlled by them to the extent of surrendering his free agency and yielding his own judgment or will, then there is no such undue influence as is required to be proved to avoid the will. To vitiate or render void a will by reason of undue influence, the influence must amount to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion,—by importunity that could not be resisted; that it was made merely for the sake of peace, so that the motive was equivalent to force and fear." Albee v. Osgood, 79 N.H. 89 (1918).

Thomas Burke substituted his own will for that of Marie's. He controlled her financial life totally. Marie expressly testified she would do whatever Thomas asked and would not do what he forbade. In the case at bar, similarly, to the circumstances in Edgerly, supra, such evidence was found. In that case there was evidence that the plaintiff, against whom undue influence was charged, was the confidential adviser of the testatrix in respect to all her business affairs; that her condition, mental and physical, was such that she was practically incapable of forming new ideas and could be easily influenced by the plaintiff; that she had an intention of dying intestate but the plaintiff, anxious to have her make a will in his favor and knowing her condition, took her to a scrivener and remained with her while she executed a will in his favor. Each of the elements of Edgerly are present in the case at bar. In Edgerly, the decedent had expressed an intention of dying intestate. As in the case at bar, both Mr. and Mrs. Burke had agreed that the property belonged to themselves and all of their children equally. Marie Burke executed no will until Thomas Burke took her to his lawyer to write the will. As in Edgerly, at the date of the will, Marie Burke was old and in feeble health, she was not likely to form new ideas, she could be easily influenced to accede to the wishes of Thomas Burke, and she was brought to the office of Thomas Burke's lawyers, Devine, Millimet & Branch, where she was introduced to Attorney Ruth Ansell. The burden might usually be on the Plaintiff, Edward Burke, to demonstrate whether or not it is more probable than otherwise, that Mrs. Burke's will, Trust and subsequent amendments to her Trust, were prepared by undue influence. The New Hampshire Supreme Court held that the usual presumption and validity of the will does not arise when it is executed under circumstances such that the Testatrix was dependent upon or subject to the control of another, makes a will in that other's favor, and there is an absence showing that the transaction was fair and honest.

The testator in Albee, supra, had charge of his own business until his death and was under no one's control. Marie Burke never wrote her own checks and relied on Thomas to not only manage her affairs but also to pay every

single expense of her living. Thomas was constructively present when the will and trust were drawn. Attorney Ansell sent a draft of the Will, Revocable Trust, the Three Amendments to the Trust, the deed from Marie to the Trust and the deed from the Trust to Thomas, to Marie to review. Thomas reviewed each document and advised his mother what changes, if any to make, and whether or not she should sign the documents. Thomas, who shared in a confidential family relationship with Marie, acquired an interest as a result of an improper conveyance, and he will be unjustly enriched unless a constructive trust is imposed on his interest in the real estate. There are no rigid requirements for a constructive trust and a court may impose such a trust to prevent the enrichment of one who acquires title to property improperly.

During the course of their relationship, Thomas kept Marie's financial records, wrote and signed all her checks to pay every single one of her bills. Joint checking accounts were set up with Thomas so that deposits of Marie's income from rents and Bunny's Market could be made by the Thomas. See, Archer v. Dow, 126 N.H. 24 (1985). She deeded the land and building on which Bunny's market was situate to Thomas fifty years after the oral agreement was made, and sixty years or more after it was first purchased by Bernard Burke for the family. No monetary consideration was paid by the defendant for this transfer. An attorney paid for by the defendant Thomas prepared the deed. Marie could not even identify the deed in Court but knew that Thomas had reviewed any "important document" and, if her signature was affixed, had told her to sign it. No attorney indicated whether he or she had inquired about the plaintiff's ability to read, although testimony was offered by the plaintiff and Marie Burke in Court that she could either not read or not understand the documents presented to her. A confidential relationship exists if there is a "personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest." Cornwell v. Cornwell, 116 N.H. 205, 209, 356 A.2d 683, 686 (1976) (quoting Kachanian v. Kachanian, 100 N.H. 135, 137, 121 A.2d 566, 568 (1956)). The record indicates that Marie was dependent upon Thomas for transportation (at least to lawyers' offices), banking services, the preparation of checks and the payment of bills. This evidence adequately established the existence of a relationship which would justify the plaintiff in believing that the defendant would act in her best interest. Cornwell, supra, at 209, 356 A.2d at 686.

Thomas, as beneficiary acting in a "fiduciary capacity," had the burden of proving an absence of undue influence based upon the inference of undue influence which arises in cases in which the beneficiary of a transfer holds a position of trust and confidence with the party making the transfer. Edgerly, supra, at 408-409. Since Marie,

the donor, was dependent upon or under the control of the donee, and since the latter took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence. In this case, it must be found that at the time the will was made the plaintiff was the confidential adviser of the testatrix in respect to all her business affairs, and that she was dependent upon him and subject to his control in respect to such matters; that her condition, physical and mental, was such that she was hardly capable of forming new ideas, but could be easily influenced to do as he wished; that she had formed an intention of dying intestate, but that he, anxious to have her make a will in his favor and knowing her condition, took her to a scrivener and remained with her while she executed a will giving him substantially all her property (except for that set aside to Bernardine). Although there is a difference of opinion as to whether the inference which may be drawn from these facts is one of fact or law, all courts agree that an inference unfavorable to the validity of the will may be drawn from them; in other words, all courts hold that they have a tendency to prove that the will was procured by undue influence. Burnham v. Heselton, 82 Me. 495; Patten v. Cilley, 67 N.H. 520, 528; In re Barney, 70 Vt. 352; Woodbury v. Woodbury, 141 Mass. 329; Drake's Appeal, 45 Conn. 9; Turner's Appeal, 72 Conn. 305; In re Smith's Will, 95 N. Y. 516; Gilham's Case, 64 N. J. Eq. 715; Herster v. Herster, 122 Pa. St. 239; Walton's Estate, 194 Pa. St. 528; Henry v. Hall, 106 Ala. 84, --54 Am. St. Rep. 22; Wells v. Houston, 23 Tex. Civ. App. 629; McParland v. Larkin, 155 Ill. 84; Maynard v. Vinton, 59 Mich. 139; Severance v. Severance, 90 Mich. 417; Ross v. Conway, 92 Cal. 632; Bingham v. Salene, 15 Or. 208, --3 Am. St. Rep. 152. In this case it could be found it was the plaintiff, and not the testatrix, who made the will. Tyler v. Gardiner, 35 N. Y. 559, 589; Delafield v. Parish, 25 N. Y. 9, 35, 92.

3. THE PAROLE EVIDENCE RULE:

The Defendants have cited the Parole Evidence Rule for the proposition that no testimony should be admitted with respect to an oral agreement regarding the gifts of stock and that this case involves gifts of the stock. The Parole Evidence Rule is inapplicable. The Stock Restriction Agreement covers only a sale. Since the Agreement, by its terms, does not cover a gift, then the Court must decide which is to be accepted: Edward Burke's testimony that all four of the family members were to own the business equally, or Thomas Burke's testimony that no such agreement existed. The scales are tipped well in favor of the Plaintiff, Edward Burke's version, because Bernardine testified that even though she did not work at the business, (she was a full-time realtor, and was raising a

family), she considered herself to have a one-fourth ownership interest. This opinion was manifested by her suggestion that in 1991, at her father's death, that when the business was incorporated, that she be given a twenty-five percent stock ownership interest. This opinion, that she continued to be an owner, was further manifested when she indicated that whoever stole the money in February, 1996 from a cash register, had stolen from the entire family. The Stock Restriction Agreement is clearly boilerplate language intended, just as Edward Burke testified, solely to keep a third party from obtaining ownership.

On the contrary, if the transfer of the stock to Thomas by Marie and Bernardine were not a gift as Edwards contends, but in fact a sale because they received consideration, then the terms of the Stock Restriction Agreement apply. In such case, stock must first be offered to the corporation, which has the privilege of purchasing the same. If that were to happen, the corporation should be ordered by this Court to purchase the same at its fair market value, thereby giving fifty percent of the ownership to Edward and fifty percent of the ownership to Thomas. The Defendants cannot have it both ways. If they intend the transfer of the stock to be a gift, such a gift is prohibited by the agreement among them that all four are to be equal owners. If, on the other hand, it is to be considered as a sale, the corporation must be allowed to purchase the same.

4. CONSIDERATION FOR THE STOCK TRANSFER:

The Plaintiff, Edward Burke, has taken the position that the stock transfers are in fact a sale because the transfer was not motivated solely by love and affection. As Marie Burke testified, family and money had about an equal or "even/Steven" importance in her view. Bernardine did not give the twenty-five percent of the stock ownership she had in the business named after her (Bunny is her nickname and Bunny's is the name of the store). She transferred the stock to Thomas Burke, as she testified, in order that he could retain control and protect himself, theoretically, against Edward. There was a quid pro quo, however, which she was reluctant to articulate. She testified that even though she had never seen the will or Trust Indenture and Amendments to the same until a week before the trial, that she knew what her mother's intentions were with respect to disposition of her property. Of course, she must have been promised something, because she and Thomas both testified that they had met together and with Marie in the weeks before April 1, 2004, when they agreed to transfer the stock to Thomas, when Marie agreed to have the Trust transfer the land and buildings on which Bunny's Superette was situate to Thomas entirely,

on March 17, 2004, and the consideration was the First Amendment to the Trust, as well as the deed of the land and buildings to Thomas, in addition to giving Thomas an option to purchase the Liberty Street property for \$90,000, a fraction of its fair market value. That same First Amendment to the Trust, executed on April 5, 2004, was the consideration for Bernardine's agreement to transfer the stock to Thomas (i.e., the residue of the estate was to go to her and the residue consisted of real estate situate on Arah Street, 86 Webster Street, the proceeds of the sale of Liberty Street (i.e., the \$90,000.00) as well as the approximate \$250,000 portfolio in Marie's name, together with whatever funds were in the joint "real estate account" in Thomas' and Marie's names.

Bernardine may not have read the will, Trust Indenture and various amendments, as she testified, but she is to receive a substantial portion of the family's property in consideration of her transfer of the stock to Thomas. See Durkin, supra. The Court may grant reformation in proper cases where the instrument (in this case, the deed from Marie Burke to the Trust, and then the Trust to Thomas Burke, as well as the will, the pour-over Trust, and the various amendments to the Trust) fails to express the intentions that the parties had in making the original agreement to treat all members of the family equally. See Erin Food Services, supra; Gagnon, supra.

5. THE FIDUCIARY DUTY OF A DE FACTO ATTORNEY:

The Defendant, Thomas Burke, acted for a number of years as a de facto attorney for Marie Burke. Accordingly, if the Court were to find that the transfer of real estate to Thomas, the execution of the will and Trust by Marie Burke, were substantial products of the control which Thomas held over Marie and her decisions regarding property, Thomas should be held to the same standard as required for an attorney as set forth by RSA Chapter 506. Specifically, RSA 506, IV (b) provides that if the agent made a transfer for less than adequate consideration, the agent shall be required to prove by a preponderance of the evidence that the transfer was authorized and was not a result of undue influence, fraud or misrepresentation. Thomas has not met this burden of proof.

6. THOMAS BURKE VIOLATED THE UNIFORM FRAUDULENT TRANSFER ACT:

In Tsiatsios, supra, some of the real estate, as in the case at bar, had been conveyed by the decedent to the decedent to the housekeeper. The Supreme Court held that under the Uniform Fraudulent Transfer Act, RSA

Chapter 545-A, the Trial Court was able to set aside the transfer unless the transferee took in good faith and for reasonably equivalent value. See, RSA 545-A:8. In Tsiatsios, and in the case at bar, the defendant, Thomas Burke, who was the transferee of the land and building on which Bunny's Superette, Inc. sat, did not give reasonably equivalent value in exchange for the transfer and, as a result, it is proper for a judgment to be entered for the Plaintiff. The Supreme Court held that there was no necessity for the Plaintiff to obtain a judgment against Marie Burke, the transferor, or Thomas Burke, the transferee, before the Court is able to set aside the transfer if in doing so, it will effectuate the agreement between the parties and if by declining to do so, it is unable to enforce the agreement. The decedent in the Tsiatsios case, in fact made it clear to the housekeeper that she should sell the real estate before the children could "pull it into court". This testimony is remarkably similar to that offered by Thomas Burke that his mother was prompted to convey the real estate so that Edward Burke, could not pull the will and trust into Probate Court.

It is not necessary to assert a claim solely against the transferee of fraudulently conveyed property in order to secure the re-conveyance of the same. See, Town of Nottingham v. Bonsur, 146 N.H. 418 (2001). It is not solely agreements to bequeath property, or to leave estates at death, that are either enforced or not enforced by the Supreme Court of the State of New Hampshire based upon oral agreements, or set aside on the basis of fraud, duress or undue influence. In Andersen v. Andersen, 125 N.H. 686 (1984), the Supreme Court held that a property settlement in a divorce, like any other contract in the State of New Hampshire, may be set aside for "fraud, undue influence, deceit and misrepresentation" See, Durkin, supra . The New Hampshire Supreme Court held that the basic rule was that the plaintiff need prove (1) a relationship of trust, (2) a breach of that trust, and (3) a resulting action which failed to fulfill the plaintiff's intentions.

III. RELIEF REQUESTED FROM THE COURT:

The Plaintiff respectfully requests that the Court grant the following relief:

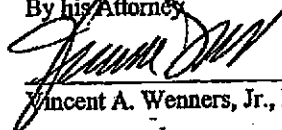
- A. The Plaintiff requests the Court order specific performance of the oral agreement between the parties. This decree will give nearly complete relief and not punish the Defendants any more than is necessary.

- B. As an aid to specific performance, the Plaintiff requests that the Defendants Thomas and Marie Burke be required to reconvey the real estate conveyed to Thomas to the name of Marie, and that a constructive trust be impressed on the real estate for the benefit of the parties to the verbal agreement.
- C. The Court rule that the Will, Revocable Trust and amendments thereto, as well as the deeds from Marie to the Trust and the Trust to Thomas be set aside as the result of fraud, duress, and/or undue influence and restored to the status quo as of January 9, 1999, impressed by a constructive trust for the benefit of the parties to the oral agreement.
- D. The Court may, in the alternative, reform the will and trust and deeds executed by Marie Burke, in order that the beneficial provisions thereof conform to the agreement and otherwise order restitution of the property taken from the Plaintiff, i.e. his equal interest in the corporation, real estate and personal property of the defendant Marie Burke's estate.
- E. Impress a constructive trust on Marie Burke's estate for the plaintiff's benefit. A constructive trust will arise when there has been a conveyance of an estate upon a promise to reconvey, or the conveyance was procured by fraud, duress or undue influence. A constructive trust following a conveyance of real estate is most commonly imposed when a court finds: ... unjust enrichment; and either a confidential or a fiduciary relationship. See 1 A. SCOTT, THE LAW OF TRUSTS § 44.1-3, at 334-44 (1967). A constructive trust will arise when the conveyance was procured by fraud, duress or undue influence, or between parties standing in a confidential or fiduciary relationship to each other." (Citations omitted.) Cornwell, supra at 208; See Wheeler v. Robinson, 117 N.H. 1032, 1036, 381 A.2d 742, 745 (1977); Pleakas v. Juris, 107 N.H. 393, 399, 224 A.2d 74, 78-79 (1966).
- F. Reform the deeds from Marie Burke to the Revocable Trust and from the Trust to Thomas Burke. The court has undoubted equity power to order this relief. "It is old and well-established law that equity, at the instance of a grantor ... will reform a voluntary conveyance. Tyler v. Larson, 106 Cal. App. 2d 317, 319, 235 P.2d 39, 41 (1951); RESTATEMENT OF RESTITUTION § 49 (1937).

- G. Award the plaintiff his attorney's fees and costs. In view of the fact that Thomas' relationship with Marie did not allow him to be the transferee of her property, a grant of reasonable attorney's fees to the plaintiff is appropriate. "This court has held that an award of attorney's fees is appropriate '[w]here an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention. ...' Harkeem v. Adams, 117 N.H. 687, 691, 377 A.2d 617, 619 (1977). In Harkeem we noted that judicial exceptions to the general rule that litigants pay their own attorney's fees are flexible and not absolute. Id. at 690, 377 A.2d at 619. We then extended the exiting "bad faith" exception to include cases in which a party's wrongful conduct caused another party to institute a lawsuit in order to protect a clearly defined right. Id. In Paquette v. St. Clair, 119 N.H. 404, 407, 402 A.2d 182, 184 (1979), we held that the "defendants' unwarranted conduct in wrongfully retaining plaintiff's property and their 'arrogant disregard of plaintiff's rights' constituted bad faith." This bad faith formed a proper basis for an award of attorney's fees against the defendants in Paquette. Likewise, in this case the defendant's conduct in wrongfully withdrawing and retaining the funds from the plaintiff's bank accounts forced the plaintiff to institute a lawsuit to recover those monies. The defendant's actions were particularly wrongful because the defendant held a position of trust and confidence with the plaintiff. The record presents ample proof of the defendant's bad faith and supports an award of attorney's fees to the plaintiff. Archer v. Dow, 126 N.H. 24 (1985).
- H. Enter judgment for the Plaintiff on the Counterclaim.

Respectfully submitted:

Edward J. Burke
By his Attorney



Vincent A. Wenners, Jr., Esquire

Dated: June 27, 2005